No. 77-1063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

SYDNEY M. EISENBERG,

Petitioner,

— vs —

UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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Petitioner

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RESPONSE TO MEMORANDUM

On March 31, 1978, the Solicitor General's office filed a memorandum, without permission and in complete violation of the specific Supreme Court order dated March 15, 1978, which provided that the Memorandum filed by the Solicitor General should be filed only up to and including March 29, 1978. For this reason and many other good reasons, such Reply should be stricken. For order of Extension, please see Appendix.

It was never agreed that the returns omitted substantial amounts of adjusted gross income. This is simply untrue. The Government's statement that "it was undisputed that the Petitioner

had signed his individual income tax returns for the years in question and that the returns had omitted substantial amounts of 'adjusted gross income'" is sheer sophistry and incorrect.

Counsel for the Petitioner, a man who considered himself an authority in the field of taxation, one Attorney George Crowley, of Chicago, maintains he did not bother to offer any affirmative testimony in defense of the case, because of the fact that the Government itself conceded that every penny of income was in the records available to the Certified Public Accountant who drew the income tax returns. Nothing is due I.R.S. Any mistakes in bookkeeping made by the Certified Public Accountant or the bookkeeper were amply explained and thoroughly explained by the witnesses, all of whom were called as Government witnesses. Mistakes were made both ways, both for the Petitioner and against Petitioner, so that they balance each other out.

No manipulation of corporate stock transactions were established for the simple reason that there were none. The trial court obviously did not understand that a "wash" sale was neither a manipulation nor illegal. The sale of the stock one day and the purchase of it the same day or later may be "collapsed" by the Government and taxed. But by no means is it "criminal" and the Certified Public Accountant involved testified it was his suggestion that a "wash" sale be made if Petitioner "liked" the stock; nothing was hidden and Petitioner simply relied upon the accountant's opinion that the stock could be sold by an individual, purchased by a corporation, without the "roof falling in" or the Internal Revenue Service, through the Assistant United

States District Attorney, misleading the Judge into believing that Petitioner did not have a right to reply on his Certified Public Accountant. Such Certified Public Accountant clearly and effectively stated that he saw nothing wrong whatsoever with the transaction, had suggested it, and still saw nothing wrong with the transaction. Petitioner relied on his Certified Public Accountant's advice. Petitioner knew nothing whatsoever about taxation, bookkeeping or the field of accounting. Levine's advice is in transcript.

The reference made to backdated checks, claiming that deductions were made in advance of the year of payment clearly referred to the fact that the Certified Public Accountant had been using for ever thirty-five years a system wherein a check was to be drawn for the date the debt was construed, within said annual period it was incurred and billed, namely between January 1st and December 31st of that year. He testified these checks were sent out as soon as money became available, which in some cases could have been after the first of the year. The important point is that the bill was incurred and the check made out for the year when the work was done or the debt incurred.

A perfect example of how the Solicitor General, the Trial Court and the Court of Appeals missed the point entirely and wrongfully convicted Petitioner is clearly delineated in the case herein. In the Appendix is a copy of a letter dated March 20, 1969 from Pauline Leonard, Assistant Cashier of the Ashland State Bank in Chicago, Illinois. The letter dated March 20, 1969 states as follows:

"We received your renewal note for $60,000.00 with your check enclosed for $195.00. Due to a typographical error, we mistakenly asked for $195.00.

The notice for interest due should have been $1950.00. Please submit a check for $1750.00, representing the difference so we may process your new note."

This letter obviously went to a bookkeeper at the Eisenberg office who issued another new check for December 31, 1969 in the sum of $1750.00. Should the bookkeeper have dated the check March 21, 1969 instead of the proper date, December 31, 1969, which was again an interpretation by the Eisenberg bookkeeper since she meant December 31, 1968 and obviously not December 31, 1969? She wrote the date 1969 on the check because she received the letter dated March 20, 1969. The check went through and was recorded by the bookkeeper as of December 31, 1968, so that the original check of $195.00 was added to the new check for $1750.00. Is this a reason for the I.R.S., the Court of Appeals, and the Milwaukee Journal to defame Petitioner? He never knew bank's mistake.

Counsel for the Government then claimed that Eisenberg reported he paid interest which was not even due in that year. Petitoner never knew what interest he owed. All he did was sign checks. Any intelligent child could understand what happened, but in this case it made no difference what had happened. It is easier to say that interest was paid when not due. Petitioner had a plot in mind. This is absurd, to say nothing of being unfair and unjust.

The First National Bank of Lincolnwood, for example, sent a blank note to Petitioner for signature, which note was promptly filled out and returned to and by the First National Bank of Lincolnwood to the Eisenberg office. The interest on the note was prepared and charged in the sum of $292,000.00; the sum of $20,723.88 instead of $10,333.55 was sent to the bank. An examination of the Notice of Interest Due from the bank shows that the bank made a mistake in the amount of interest due, x'd out the sum and reduced it to $10,333.55, although an examination of the note proves that behind the x's crossing out the amount of the note were other figures which look like $299,077.77 and the note further states that the note was due September 30, 1969, the note itself being in the sum of $292,000.00. The note further says that the interest due 3-31-69 was $10,333.55. It did not say the bank would wait for the interest payment. Why the Eisenberg bookkeeper paid the sum of $20,723.88 on December 31, 1968 can be answered simply and honestly.

Petitioner knew the bookkeeper. The check was not made out to a bank. There is no way the bookkeeper could have gained from the transaction. If she handed the check for signature to Petitioner, who was busy at the time talking to a client, listening to a telephone conversation with his left hand and signing a group of checks with his right hand, he would have no reason to mistrust anyone involving a check to a bank or banks.

The Certified Public Accountant had a duty to see if the check was made correctly because the books would have to be accurate by tax time. The Bank would certainly acknowledge overpayment

or under-payment. Keeping records in this situation, in the mind of the Petitioner, was a routine matter to be handled by computers, adding machines, and, if nothing else, by an "abacus" or someone paid to be an accountant and who could count on his toes, if nothing else. Certainly, since Petitioner owned and the bookkeepers used four or five NCR 332's and 333's, he had every right to rely on all these qualified people. He ran no machine.

It was the Internal Revenue Service who added two and two together and got seven. It was the Internal Revenue Service who apparently convinced the Trial Judge, the Court of Appeals and the Solicitor General's Office that Petitioner deliberately paid interest in advance, although he was not required to, when there is no way under the sun he could have known what his income tax would look like until the middle of the following year. The conclusions reached by the Trial Judge and the Solicitor General's Office in its Memorandum simply boggled the human mind. It is all the more reason why Petitioner retained two firms of Certified Public Accountants and why, when a Certified Public Account was asked in the trial why there were two firms who prepared the income tax returns rather than one, he said that he asked Mr. Eisenberg the same question and Mr. Eisenberg said "two heads are better than one." The trial Judge simply missed the point and the problems of a taxpayer.

As to the Certified Public Account's opinion of their own ability to keep accurate records and put the mind of the taxpayer at ease, we are enclosing in the Appendix an ad prominently displayed and paid for to the powerful Milwaukee Journal through its morning paper, the "Milwaukee

Sentinel" headed: "CPAs Controllers of the bottom line. ....They solve problems, analyzing alternative financing, evaluating production introduction, working to help maintain full employment. Business and industry reply upon CPAs. We all do. CPAs. They count in more ways than one. Wisconsin Institute of Certified Public Accountants." This ad is displayed in the Appendix, Milwaukee Sentinel, Monday, March 27, 1978.

It appears everyone had a right to rely upon his Certified Public Accountants except Petitioner. Of course, Petitioner only had two Certified Public Accountants making out his income tax returns. If this is the Solicitor General's theory of fair play, one can only conclude that the entire country is in big trouble.

What is there so difficult to understand that any layman would believe that his accountant was doing the proper thing when for the last twenty years Internal Revenue Service had been coming in, checking the books annually, and never complained about this "Hybrid" system. It was easy for the Government to tell the trial judge that such a system was more applicable to a smaller company or a smaller operation, but the truth of the matter is Petitioner never considered that he was a "big operator" nor that his partnership was a "big operation" or that his operations were "big" operations". Although there were many employees, many bookkeepers, tens of thousands of entries, the net earnings were not "big". Petitioner thought he was just an average American, who could rely on skilled people.

How the Government can misconstrue an advance payment of interest on loans which had to be renewed during a tight money marked period, is

again almost impossible to comprehend. Perhaps the Internal Revenue Service auditors were unaware of the difficulty of renewing loans for hundreds of thousands of dollars based on a note with stock collateral in a tight money market. When the bank calls for advance interest, that's it, or no loan. With all the bad publicity Petitioner was getting, it's a miracle he made the renewal loans at all.

The claim that Petitioner exercised "extensive control over his financial transactions" is false and misleading. Petitioner had nothing whatsoever to do with the bookkeeping, keeping of records and drawing of tax returns by the Certified Public Accountant firms who were absolutely qualified, had in some cases worked for the Internal Revenue Service fraud section, and who at all times were told to and relied upon to keep records honestly, correctly and properly. The fact that Internal Revenue Service photostated thousands of entries which, as Shakespeare would say "signified nothing," created an inference that all the papers, additions, subtractions and deductions in the case created smoke and therefore there must have been some fire, if inferences are permitted which lead to any kind of conclusion, in this case completely unwarranted.

The evidence simply does not meet any kind of test adequate to create three felonies. There was no motive proven or even inferred since gains and losses offset each other. Petitioner erroneously paid taxes on dividends from stocks he didn't own. There was nothing due and owing, but the fact that the Court couldn't find a motive is significant. None could be found because of the additional reason that the condition of the books was not established in the end of any cal-

endar year. There is nothing to infer because the Certified Public Accountants had established time frames which were followed carefully by the accountants and bookkeepers; they were in complete control of the records. To say otherwise is an absolute falsehood. Nothing was withheld from the I.R.S. Everyone dropped all other work to answer innumerable questions.

There is no question either with respect to the charge of 1968 being barred by the Statute of Limitations. An indictment was understandable and was complete on the basis of a failure to report gross earnings. This means in plain language that some income was not reported. Changing the charge to net income clearly means a charge altogether different, namely, that the problem was not with the gross income but altogether different since only the net income was involved and the claim was only to deductions. The Court had no right to convict Petitioner on transactions which occurred prior to 1968 when, as a matter of fact, even said prior transactions outside of the years of indictment were in no way, shape, form or manner illegal or wrong. Petitioner sought to keep the money belonging to the corporation reinvested for the corporations.

The money belonging to the corporations were invested in stocks at a higher than the 2% rate that had been received on Government bonds. This was done so that the corporate buildings need not raise rents, particularly when people living therein were on Social Security and had limited funds. The testimony is clear on this point, but the Trial Judge did not seem to understand it and the Solicitor General did not understand why the Petitioner would do this. The Certified Public Accountants explained it. What else can Petitioner

do?

The Trial Judge, a member of the Court of Appeals, improperly hearing the case without a written order from anyone, had his decision reviewed by his colleagues sitting in the Court of Appeals, and the Petitioner has had what should have been the best years of his life turned into the worst years of his life fighting to clear his name, culminating in a heart attack, a stroke and disgrace. If the Public can be convinced that Petitioner is a three time or even one time felon, not to be believed, then who will believe the truth about the death of Judge Krueger; Petitioner tried to save the life of a mentally ill judge who came to him for help. The powerful Milwaukee Journal, after the Judge issued a statement that he was appointing an honorary advisory committee to act as an ombudsman with the traffic court and treat everyone fairly with respect to color, religion and creed, then the Sentinel reporter ordered the Judge to leave his courtroom, go to the Sentinel editorial office immediately where he was admittedly caused to cry and pushed by the Editor into a chair. Within forty-eight hours a Milwaukee Journal reporter called the Judge, lied to the Judge and told him the District Attorney was going to investigate and remove him. The Judge, when asked for his comment, went into the bathroom, after taking the court bailiff's gun which was hanging in a holster, and killed himself. This was all made a matter of record only because Petitioner and his counsel courageously persisted in fighting charges of harassment of the Judge brought by the chairman of the Wisconsin Board of Bar Commissioners, and the Referee in that first suspension hearing cleared the Petitioner completely after hearing all the evidence. The Wis. Supreme

Court overruled the Referee and suspended Petitioner for 12 months and imposed a $20,000.00 fine. The twelve months suspension was stretched into twenty-one months.

In the instant case the Assistant District Attorney Bukey kept telling the Trial Judge Petitioner had been "disbarred". The Judge finally conceded a suspension was not a disbarment. But the powerful Milwaukee Journal continued to discredit Petitioner on every possible opportunity referring in story after story to the fact that the Petitioner had been disciplined by the Wisconsin Supreme Court because of "events leading to the death of Judge Krueger", in some stories reporting Petitioner had been disbarred. See apology in Supplemental Appendix.

The many newspaper stories in the Internal Revenue Service Intelligence file did not "fly" into the file. They were given to the Internal Revenue Service obviously by someone using the powerful Milwaukee Journal stories to get the Internal Revenue Service to do their "dirty work". Internal Revenue Service came through, as it did in other cases. Asst. Attorney Gen. Hyatt's recommendation for dismissal as stated to Attorney Gimbel was overruled. Why?

In his fight to clear his name against the powerful Milwaukee Journal, its subsidiary Milwaukee Sentinel, WTMJ, WTMJ-FM, WTMJ-TV, radio stations and television stations, Petitioner had to protest his righteousness against the elected Wisconsin Supreme Court Judges charges when everyone else was seeking the support and power, known and unknown, of the Milwaukee Journal, its lobbyists, its lawyers and its would-be allies. The Chief Justice of the Supreme Court, running

for election, was given many pages of favorable commentary in the Milwaukee Journal after the first suspension of Petitioner was ordered by the Wisconsin Supreme Court. He was re-elected, but is now deceased. Journal reporters have been known to brag about their power resulting from their daily visits with some judges to find out what had occurred in cases. Petitioner is not so naive as to believe that the Milwaukee Journal is not able to influence some members of the Judiciary and politicians.

There are some other TV and radio stations in the area. But since there are several TV stations and a number of radio stations, is the effect of the powerful Milwaukee Journal is somewhat diluted in any way?

The truth of the matter is that the programs of the TV and radio stations are published in the Milwaukee Journal at the whim and pleasure of the Milwaukee Journal. Does such a monopoly have an effect on the other minor "token" competition? The answer is obvious. What radio station or TV station would dare stand up to the power, both acclaimed and unknown, of the Milwaukee Journal. It takes courage indeed. Printed schedules needed.

The close co-ordination between the Milwaukee Journal and the United States District Attorney's office is clearly emphasized such as in the article, which is part of the appendix of this Reply, which shows the close co-ordination between Milwaukee Journal reporters, the United States District Attorney and Federal Grand Juries. Petitioner does not claim that any citizen, whether he be an ordinary individual or a newspaper reporter, cannot make a complaint. However, the effect of an ordinary citizen's complaint, as

against that of a newspaper reporter backed up by a monopolistic, agressive and mass media capable of a "cover up" in case anything goes wrong is so obvious that even an ordinary lawyer, as well as a suspended lawyer, who spent a lifetime trying to help keep justice operating is obvious.

It is difficult to fight a mass media with truth when there is no other medium with an equal effect so that the community can learn the complete truth. Lawyers who speak out to promote the ends of justice can be squelched like a candle in the night by a raging storm. How can a case be heard by an impartial jury when the press has conducted years of scurrilous untruthful attacks suggesting Petitioner had caused the death of a Judge? Can the powerful press not only sweep their sins under a rug but also provide a "patsy" almost at the cost of his life?

Bailiff Steve Kuzmic, in Judge Krueger's Court, refer to pages 432, 433, 434 of the appendix, testified at the trial that Judge Krueger had lent him thousands of dollars. As to Reporter Janz, page 434 of the appendix, that Milwaukee Sentinel slipped up and printed: "...About two hours later I returned, I told him I had informed my city desk of what had occurred and it was very concerned about him. 'You can't print anything about what happened', the judge said, 'Bill, you're going to ruin me.' I said we were primarily concerned about his health and his ability to sit on the bench and rule impartially under these circumstances."

Petitioner, on December 22, 1977 was forced to sell two buildings because of a tremendous amount of debts he had incurred, to say nothing

of unfounded claims. The report in the Milwaukee Sentinel, dated December 22, 1977 reporting the sale of the buildings, in no way refers to the huge mortgage and debts due, but instead refers to the instant tax conviction and the Wisconsin Supreme Court's suspension of Petitioner's right to practice law because of the "three convictions" which in truth were three counts of the one indictment and conviction which is the subject of the instant appeal. Relevancy? No. Slander? Yes. There will never be an end to this tax persecution because of Petitioner's audacity in finding the truth for the death of Judge Krueger. Every influence and power of the Milwaukee Journal is utilized to defame Petitioner and cause people not to believe him. Even his obituary must have been carefully prepared in advance to complete his character assassination. Is this an American concept of justice?

The attorney for the Board of Bar Commissioners who successfully obtained a suspension of the Petitioner's license to practice law in Wisconsin, was the petitioner in the disciplinary proceeding rather than the Wisconsin Bar Association who is in the best position to know Petitioner for approximately 40 years, understand his beliefs and decency, honesty and fair play. The counsel for the Bar Commissioners, a group chosen under Sec. 256.28 of the Wisconsin Statutes by the Wisconsin Supreme Court, stated in his brief to the Wisconsin Supreme Court, which remark was printed in the Milwaukee Journal for everyone in Wisconsin to see, that Petitioner cannot be believed.

The United States Supreme Court is not subjected to the vagaries of elections under the American Constitution. Judges, whether elected

or appointed, need support of the public to reach the highest levels of our court system. On the other hand, they can be misled by sheer rhetoric sophistry and perhaps inability to see the entire picture. At any rate, justice simply must prevail in our world or everything is lost. Petitioner is not the first one to be slandered by the unlimited power of the Milwaukee Journal.

The editorial of the Milwaukee Journal found in the file of the Internal Revenue Intelligence refering to the Wisconsin Supreme Court suspending the license of Sydney M. Eisenberg and his son, Alan D. Eisenberg, to practice law for at least one year ends saying "The court did admirably what it had to do". Page 201 of the Appendix. These words are startling and audacious, inebriated by the exuberance of their own verbosity.

When the Milwaukee Journal said the court "did what it had to do", was the Journal simply warning the Judiciary that when the Journal is involved in the matter, Journal interests had to be respected? Was the editorial intended to thank the Supreme Court for taking the Journal "off the hook"?

The Wisconsin Supreme Court had before it the evidence adduced by the Referee in the transcript which proved how the Milwaukee Journal reporter had telephoned the Judge, lied to him about his removal and when asked why he did this to the Judge, stated that he was leaving town and leaving the Journal within two weeks after said Journal reporter testified. The Wisconsin Supreme Court knew that the Eisenbergs had devoted thousands of hours, to say nothing of the money given to the attorneys who represented both Eisenbergs and were paid a huge amount, although

balance was in dispute, his representation and bills were made the subject of the two counts of the three indictments herein. Petitioner can only ask: "Is there no balm in Gilead"?

In the case of United States v. Bishop, 412 US. 346, (1973), defendant was charged with violation of Sec. 7206(1) and upon conviction appealed to the United States Court of Appeals for the Ninth Circuit. See United States v. Bishop, 455 F.2d 612 (9th Cir. 1972).

In the United States Supreme Court, Mr. Justice Blackman held that Sec. 7207 was not a lesser-included offense within Sec. 7206(1), and he remanded the case to the Court of Appeals for consideration of the other errors urged by the defendant. Justice Blackman concluded that there are distinctions between Sec. 7206(1) (a felony) and Sec. 7207 (a misdemeanor), and he stated as follows:

> "In the felony, then, the taxpayer must verify the return or document in writing, and he is liable if he does not affirmatively believe that the material statements are true. For the misdemeanor, however, a document prepared by another could give rise to liability on the part of the taxpayer if he delivered or disclosed it to the Service; additional protection is given to the taxpayer in this situation because the document must be known by him to be fraudulent or to be false." 412 US at 358.

In its Federal Court memorandum, the government in the case recited the first of these sentences; however, it is clear from the second sentence of the opinion of Justice Blackman that when it is not proven that the defendant prepared the false return, the appropriate charge is the Sec. 7207 misdemeanor.

The government has asserted that the statute should not be read in a way "so as to make liability turn upon fortuitous factual differences." Petitioner respectfully asserts that the differences between one who makes and subscribes a return and one who does not make but only subscribed a return is hardly fortuitous. It is instead a distinction founded upon the terms of the statutes themselves: one who prepares and signs a tax return which he knows to be false may be prosecuted for a felony; one who merely files or places in the possession of a government agency a false return should be subject only to the misdemeanor. This is one distinction which alone requires a judgment of acquittal of the instant charges.

Reproduced in the Appendix is a report by Edward R. Schwalbach, a special agent of Internal Revenue Service Intelligence, which took place October 14, 1971. This report by Agent Schwalbach proves in his conversation with former Agent Rakita, who in the instant case was representing Petitioner, on Page 3 of the report or page 385 of the Supplementary Appendix, that the Internal Revenue Service Intelligence was on a "simple fishing expedition": ".....Rakita objected to the granting of this extension. He stated that Kelly had been working on the returns for over a year and he did not believe additional time was necessary. He stated that

during all the years he had worked with the Internal Revenue Service he never spent that much time making an audit. He thought the explained issues were merely technical and asked Kelly if Eisenberg's books and records were in agreement with the returns. Kelly responded that he did find that the books and records were substantially in agreement with the returns filed."

"I then explained that I had considerable annual leave to take prior to the end of the year, that I was currently working on other investigations and that it would be some time before I could start working on this investigation. I also explained that in addition to the so-called technical adjustments that I was not satisfied that Mr. Eisenberg's returns reflected all of his income."

"Rakita then asked if we had any specific evidence that Eisenberg was not reporting any of his law receipts. I told him that we had no such evidence, however it was my job to determine the correctness of any returns assigned to me for investigation. He then said that I was merely 'fishing' and that they would not stand for this type of investigation especially in view of the amount of time that Kelly had spent checking the records. I told him that I did not agree with him, however if he believed that I was not properly conducting the investigation he could contact the office and complain."

"They finally agreed to extend the Statute of Limitations for each of the years 1966, 1967 and 1968 to June 30, 1972. These forms were left with Levine who was asked to return them after they had been signed."

The corporations involved were wholly owned by Petitioner. The Nankin Certified Public Accounting firm, when subpoenaed by the Internal Revenue Service, had the minutes in the file proving that Petitioner was authorized to purchase the stocks in his own name for the corporations. This was done. The Judge overlooked the fact that the minutes provided the President and sole owner of the corporation was to sell assets and replace it with stock. Nowhere did it say the exact dollars were to be used. This would be impossible to do. Since the minutes were never disproved, for the simple reason that they were properly drawn, entered and put in the corporation books, Mr. Schwalbach's report of the meeting of November 11, 1971, reported on pages 389 and 390 of the Appendix, amply explains it and apparently satisfactorily did explain exactly how the matters were handled and proved that Petitioner had nothing to do with the keeping of records or the returns themselves. The minutes were admittedly prepared at CPA Gillman's suggestion.

"At the start of the meeting Rakita introduced me to Ed Gilman, and explained that he was the C.P.A. who prepared the corporation returns of Shoreland Manor & Prospect Heights for Eisenberg.

"Rakita then explained that he wished to be sure that he understood the office procedures for keeping the records and who was responsible for the preparation of tax returns. He stated that all the records of income and expense for the legal practice and rental were kept by Eisenberg's employees in his office. They also handle Eisenberg's records relating to purchases and sales of stock and the receipt of dividends, from

those stocks. The office help also record rental and other income and pay expenses of the corporations owned by Eisenberg. Rakita stressed the points that Eisenberg was a busy attorney and also since the Krueger affair demanded so much of his time during the past several years. Eisenberg did not have the time to work on any of his records and did not even have time to determine if his employees were doing a proper job. Rakita stated that Eisenberg was then forced to rely on his employees. He also stated that Levine prepared Eisenberg's personal returns and that Gilman prepared the corporate returns.

"He stated that when it came time to prepare the returns both Levine and Gilman would contact the employees in Eisenberg's office who furnished them the necessary information and records that were required to prepare the returns.

"Both Levine and Gilman agreed with Rakita's statements as did Eisenberg. Levine and Gilman stated however that after they received the information to prepare the returns they would have to prepare the journal entries to close the books. After the returns were prepared they would be given to Eisenberg for signing and mailing.

"Rakita then explained the circumstances that caused the failure to report a portion of the profit from the sale of the Gisholt stock belonged to the two corporations. Shoreland Manor and Prospect Manor.

"After finding this out Levine had to make out a new return for Eisenberg omitting the Gisholt stock sale.

"He then in May 1968 wrote a letter to Gilman in which he related a conversation that took place in late March between Gilman and himself.

This letter states as follows:

'According to Mr. Eisenberg, the shares of Gisholt Corp. which were purchased in 1965 and 1966, were purchased with funds from the two above companies, (Prospect Heights Co. and Shoreland Manor Co.) but the broker erroneously put the shares in his name. If this is the case, then the profit on the sale of the stock should be reported by Prospect Heights and Shoreland Manor.'

Attached to the letter was a schedule showing the purchases and sales of the Gisholt Corp. stock.

"Levine agreed that this is what happened. Gillman stated that he received the letter and that he did report part of the sale of Gisholt stock on the corporate return of Shoreland Manor Company for the fiscal year ending 2/28/68. Gillman said that the balance of the profit from the sale of the Gisholt Stock was not reported on the 1967 Prospect Heights Company return in spite of the fact that this return was filed about a month after he received Levine's letter relative to the stock sale. He said that he checked his work records for May and June 1968 and found that he had not worked on the Prospect Heights return during that period. He accordingly concluded that he had already prepared the return prior to receiving Levine's letter and somehow overlooked changing the return to include the Gisholt transactions.

"I then asked Gillman if this stock belonged to Shoreland & Prospect if it was carried as an asset on the company balance sheets. He said that at one time he thought it was on the balance sheets but then found out it was not on the company books as an asset...." (Schwalbach.)

On a taped conversation, a copy of which was presented to the United States Attorney before trial, Internal Revenue Service Intelligence Agent Schwalbach stated that if nothing else was involved, perhaps he should not have been on the case at all.

There are pages in the Appendix proving the various overpayment of taxes, so that for the most part the Internal Revenue Service was repeatedly overpaid and had to return funds to Petitioner. Considering the volume, the different types of transactions, the many bookkeepers and accountants, as well as their help who are involved, the books and records must be considered excellent compared to the average business which did not hire as many experts or specialized help.

The Supplemental Appendix attached to this Reply includes "cutouts" from the Milwaukee Journal dated February 22, 1978 which emphasizes the working connection between the Milwaukee Journal staff and the former United States District Attorney's Office in Milwaukee, whose new replacement was sworn in within the last few days. In the story of 3 WHO SOLD 'GOLDEN LAND' IN TEXAS INDICTED FOR FRAUD, for example, it is interesting that the Journal articles make it appear that the United States District Attorney's office is working hand and glove with the Milwaukee Journal. Here was not only the monopolistic newspaper media in Milwaukee, but apparently the largest property owner, virtually the largest

source of news, the quintessence of conscience for Milwaukee and the power with the right to sit in on trials. It could discuss cases with at least some of the Judiciary, remove a Judge from his bench to the office of the Editor of the newspaper during his working hours, watch him cry, tell him an untruth, see him die, somehow find its newspaper stories in the hands of Internal Revenue Service Intelligence, which for some reason cannot find any data pertaining to the newspaper clippings or how they got in the file. It could squelch the story of the Judge's death with respect to the relationship between the reporter, the Editor and finally be lucky enough to find it was never mentioned in the suspensions in the Wisconsin Supreme Court opinions, repeatedly suggesting, however, in its stories that Petitioner caused the death of a Judge.

With Internal Revenue Service Intelligence seeing such stories before it, the result was Internal Revenue Service Intelligence went on a selective "fishing expedition", resulting in Petitioner, who had virtually nothing to do with his bookkeeping or accounting, to be found guilty of signing a false return, when he had not the slightest reason to expect the returns were wrong in any way, shape, form or manner. The power of the press has run amuck in this case.

It is difficult to believe that the Solicitor General himself, or anyone else, can find any justification for the wrong that was committed on the Petitioner. The attorney for the Wisconsin Bar Commissioners, who was former Chairman, was a former lobbyist for the Wisconsin Daily Newspaper League, unquestionably led by the largest newspaper, the Milwaukee Journal. Unless reversed, the Petitioner is guilty of three

felonies in the eyes of everyone and should not be believed at all. This statement is contained in the Wisconsin Supreme Court suspension brief, and is referred to in the attached Appendix. Petitioner asks the United States Supreme Court to clear Petitioner of these charges for felonies which are an insult to the intelligence.

SUMMARY

Petitioner is reproducing herein the entire Brief of Counsel for the Bar Commissioners in response to Motion for Rehearing. Speaking for the Wisconsin Board of Bar Commissioners, which was appointed by the Wisconsin Supreme Court his Brief is filled with the most scurrilious, calumnious sheer "hogwash" he could possibly include in what should have been a dignified presentation.

He threw caution and decency to the winds, because he knew he would be supported by the press. Even the Wisconsin Supreme Court had enough conscience to realize the lengthening of the twelve month suspension to twenty-one months was not a problem caused by Petitioner. They finally ordered him reinstated with the costs charged to the Wisconsin State Bar Association, whose large membership includes Wisconsin's largest law firm, which just happens to be counsel for the Milwaukee Journal and which was reported by the Milwaukee Journal last week to have obtained a court modification of its personal property tax involving rental of four floors at the First Wisconsin Bank Building, Wisconsin's largest bank, for $220,000 annually for each of four floors, and $1,600,000 worth of improvements.

The same law firm, then called Foley and Lardner, represented the Journal and its Sentinel throughout the many months of the hearings involving the Petitioner's first suspension before the Referee who cleared Petitioner although same was reversed by the Wisconsin Supreme Court for reasons which most lawyers never did nor now do understand. In the second suspension, the Journal printed Bichler's worst insults decrying Eisenberg's truthfulness.

A petition for certiorari to the United States Supreme Court on such suspension was denied.

But that suspension hearing followed the Tucker case explained in the instant case Petition. And in the Tucker case it was clearly proven by the Eisenberg lawyers that the police burned down to the ground the Tucker building containing a Mrs. Moses who was burned to death in the process.

The Journal overlooked the fact that a very much alive woman was burned to death by police shooting tear gas into the building to get out the black Mr. Tucker, who never intended to shoot any police officers at all. Plainclothes people were shooting at him so he shot back and was cleared of first degree murder in this community brought to a frenzy by the Milwaukee Journal, Milwaukee Sentinel, WTMJ-AM and WTMJ-FM, WTMJ-TV who were selling papers and viewers like crazy.

But let us not overlook the gratitude of the Milwaukee Police Department to the Journal for virtually ignoring the burning to death of the very much alive Mrs. Moses.

No wonder Petitioner and his family's lives were threatened, the safe in his office broken open; he was accused of bringing about a Judge's death, suspended from the law practice, his bookkeepers and accountants bombarded by IRS accountants and IRS Intelligence and he was selectively prosecuted. Anyone can see the Milwaukee police get free Sunday Journal papers at the Milwaukee Journal main building.

Attorney Robert H. Bichler, Attorney for the State Board of Bar Commissioners says "perjury type convictions violate the lawyer and render

him unfit to continue in the practice of law. If it is 'calumnious' to so argue, then we respectfully submit that what the bar needs is more such calumny."

Petitioner now submits that when the letter from the C.P.A. making out the tax return which was generally sent over an hour or two before the deadline for filing for signature on the many pages, any taxpayer is justified in accepting the word of his C.P.A. that the return is in order. When the books and records are complete and nothing is hidden or kept from the records by the taxpayer, he has no choice but to accept the judgment and word of his C.P.A.'s.

If U.S. Senators, Judges, governors, former IRS administrators all agree that an individual with complex business activities be expected to make out his own return, why should Petitioner be singled out and held responsible even if there were no errors or mistakes, which in this case were generally causing expenses to be overlooked and income charged to Petitioner which he didn't owe.

Were the reviewers of this case afraid to face the truth and clear Petitioner? Is the Solicitor General afraid of some unknown power? Petitioner hopes and prays that someone, somewhere will stand next to him, tall and unafraid to clear a victim of an American holocaust.

The reply to Attorney Bichler's brief entitled "Respondent's Reply to Petitioner's Brief" is also being printed herein, because Attorney Ray T. McCann is a former president of the Milwaukee Bar Association and also former president of the Wisconsin State Bar Association. His brief

was returned by the Wisconsin Supreme Court for the claimed reason that the Wisconsin Supreme Court rules do not permit a reply to a brief on a motion for reconsideration. But it was sent, it makes sense, it corrects erroneous statements by Attorney Bichler and it is reason enough for the reversal and dismissal of this case sought herein.

How in the world could Petitioner try cases in one court after the other and then do any bookkeeping, which he never had done? See article in Milwaukee Sentinel of March 21, 1967, which stated as follows:

JUDGES CLAIM BUSY LAWYERS SLOW COURTS
By William Janz

A proposal will be made to set up a court system which would indicate whether certain attorneys have so many cases pending in civil court that it sometimes prohibits courts from operating effectively.

Some judges have said that the court calendar here is in excellent shape but that a few attorneys, one in particular, have so many cases pending in various courts that it is difficult to set a case for trial involving them.

Francis X. McCormack, clerk of courts, said he would recommend in a letter to the county board of judges that each attorney be assigned a number. McCormack's office could then tell how many cases every attorney has pending and where.

Circuit Judge William I. O'Neill said he would recommend to the county board of judges:

* That an attorney be permitted only one adjournment when a case is ready for trial.

* That the board establish a certain number of cases, possibly 50, as a maximum that an attorney could have pending here.

Atty. Sydney M. Eisenberg, one of the busiest trial attorneys, said, "This is ridiculous. The courts are succumbing to the wishes of the wealthy defense law firms, the insurance companies, that want to eliminate capable plaintiff law firms.

"If the judges do their bidding, something may have to be decided in the elections. What business is it of anyone's how many cases I try? It's none of anyone's damn business."

When Eisenberg is trying a case in one court, sometimes several other courts will call the court that Eisenberg is in and ask that he report immediately after his case is finished. Some courts reportedly have set up five or more of Eisenberg's cases in a row and once he is in court, the judge doesn't let him go until the cases are finished.

However, one judge recently said that a client has the right to choose

his own attorney, no matter how busy that attorney is. And he said that person also has the right to have his day in court even if he and the court have to wait a long time because the attorney is busy."

In another issue of The Sentinel by the same reporter:

"The law firm of Eisenberg & Kletzke is involved in 367 civil cases that are pending in circuit and county courts here, a report showed Wednesday.

***

Eisenberg has five attorneys in his firm, but two of them are assigned to divorce and criminal work which was not considered in the report.

The firm represents plaintiffs in 325 cases, more than any firm in the county. The report also showed that the firm was not ready for trial in 263 of the 357 pending cases.

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One judge said, "You can't tell anyone they can't go to Eisenberg."

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Bichler's Brief:

STATE OF WISCONSIN

IN SUPREME COURT

No. 76-108-D

In The Matter Of The Disciplinary Proceedings Against

SYDNEY M. EISENBERG,
Attorney at Law.

BRIEF OF PETITIONER IN RESPONSE TO MOTION FOR REHEARING

ARGUMENT

The petitioner makes response to the brief of respondent on his motion for rehearing not because the brief appears to contain any merit, but because silence by petitioner might be construed by respondent as an acknowledgment that his brief has merit or such silence might be construed by respondent as acquiescence of petitioner to the charges made in the brief.

Since most of the matters raised in the brief have been ably answered in this court's original decision, petitioner in this reply will attempt to be brief without being unduly curt.

Attorney Eisenberg stands convicted (by proof beyond a reasonable doubt) of thrice wil-

fully and knowingly verifying by written declaration under penalty of perjury matters he believed not to be true and correct. It will not be harmful to the bench, bar or public if lawyers are "chilled" or rendered fearful from indulging in such conduct.

What is most frightful to the interest of the bench, bar and public is the almost paranoid persistent blindness of respondent to the wrongfulness of his conduct. Unless respondent recognizes his wrong (which he refuses to do), there can be no hope that he will right his ways. His rehabilitation is hopeless. To reinstate him at any time will be perilous to the bench, bar and public.

Respondent has not only blinded himself to the perjurous nature of his conduct, but he also now criticizes and contradicts this Court's decision in respondent's previous disciplinary case. Respondent has apparently also blinded himself to his misconduct presented there.

He attempts to lay at the feet of his bookkeepers and accountants the responsibility for his pattern of manipulation in his financial activities.

He is blind to the function of the lawyer who fails to see that perjury type convictions violate the lawyer and render him unfit to continue in the practice of law. If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

It is this court's responsibility (and it was not that of the federal court) to impose professional discipline on Mr. Eisenberg for his

perjurous actions.

The reasons Mr. Eisenberg after his previous suspension was not reinstated for a period of 21 months are not of record here. But if facts outside the record are going to be considered in this argument for rehearing, then it is only fair to point out that the delay was principally a problem caused by Mr. Eisenberg. For him to now call the delay vengeful treatment by the State Bar is for him to again distort facts.

In speaking of the legal profession, Justic Frankfurter has stated:

> "From a profession charged with such responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that has, throughout centuries been compendiously described as 'oral character'." Schware v. Board of Bar Examiners 353 US 232, 247, 1 Law. Ed. 2d 796, 7 S. Ct. 752.

Mr. Eisenberg does have his constitutional right to make his living. If he chooses, however, to make it within the legal profession, he must possess the quality of truth-speaking. His three felony convictions prove beyond reasonable doubt three instances of his lack of the quality of truth speaking.

If rehearing is merited on any issue, it is merited solely on the issues as to whether or not the six month suspension is adequate in view of

the respondent's either inability or persistent refusal to recognize professional misconduct.

Respectfully submitted,

ROBERT H. BICHLER

Attorney for Petitioner,
State Board of Bar
Commissioners

McCann's Brief, refused by the Wisconsin Supreme Court:

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against

SYDNEY M. EISENBERG No. 76-108-D

Attorney at Law.

RESPONDENT'S REPLY TO PETITIONER'S BRIEF

At the outset, it is to be noted that nothing in the Petitioner's Reply Brief disputes anything contained in the brief of Petitioner in support of motion for rehearing. Furthermore, adjectives, no matter how descriptive, cannot change facts. There were not three convictions; there were three counts in a single indictment.

The tax returns in question were prepared by certified public accountants and not personally by the taxpayer. On page 2 of Petitioner's Brief, in response to a motion for rehearing is found the following statement:

> If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

If this statement is sarcasm, we submit it has no appropriate place in this matter. If lawyers cannot rely on certified public accountants to prepare

tax returns, as Judge Morrison so aptly inferred, there indeed is a caveat to all attorneys that reliance upon accountants may result in criminal convictions.

The record in this case shows that, notwithstanding the numerous clients that Mr. Eisenberg had represented, none made any complaint about Lawyer/Client relationship.

As the Federal Court stated, it was not a "tax evasion" case. There was no money due and owing to the Government. There was no claim in the criminal action that the therein named defendant concealed any money due the Government nor that he altered any records. Any taxpayer under the same circumstances, if such taxpayer were a selected target for the I.R.S. as was Mr. Eisenberg, any member of the Bar could be suspended from practicing his profession.

More than two months of the suspension has already expired and we respectfully submit that the suspension should now be terminated forthwith.

Respectfully Submitted,

RAY T. McCANN
Attorney for Respondent.

CONCLUSION

The Solicitor General's office simply can't be serious when the statement is made that a man of extensive business experience necessarily knows or does anything about bookkeeping. The evidence herein did not disclose that Petitioner had anything whatsoever to do with bookkeeping. All he ever did in that area was sign checks.

Since the record is absolute on this point that Petitioner never did direct or even see any of the records involved, this should clear Petitioner completely. There is no evidence to the contrary and if there were any, it would be untrue, false, a baldfaced attempt to "frame" Petitioner. This is a serious misstatement of fact and is reprehensible, to say the least.

The conclusion that I.R.S. tax accountant Kelly assumed, when he told Petitioner that the president of General Motors can be held responsible for mistake of a company auditor refers to a civil liability. It is legally wrong to conclude, as the Trial Judge herein did that "viewing the whole picture, the trial court could reasonably conclude that although petitioner did not prepare the returns which he had signed and filed....he knew that he should have reported more income than he did."

Is this a responsibility of a taxpayer, looking at 10 to 30 pages each of a state and federal income tax return which contains totals of additions? Is he supposed to doubt the honesty or ability of C.P.A.'s hired to do this job correctly? Does I.R.S. require an attorney who deliberately stayed away from bookkeeping to be one whether he wants to or not? This is bondage,

slavery and mental torture, courtesy of the I.R.S., the new overseer of mental thinking processes, protected by the power of the U.S. Judicial and Administrative systems.

No one with a sense of fair play can submit to this type of conduct.

As to the Solicitor General's concern about the "unknown power" referred to by Petitioner, it is obvious that he is unaware of the facts in this case. Has anyone ever heard of "the power of the press"? Is it necessary to exhume a human body from the grave to know that Judge Krueger is dead? Whose misconduct occurred when the reporter called the judge, obtained a reaction to a lie and then started a "coverup" which resulted in the printed word assassinating the character of Petitioner? Is it too difficult to read the name "Milwaukee Journal" or its counterpart, also owned, the Milwaukee Sentinel or the newspaper clippings in the I.R.S. Intelligence which had nothing to do with taxes but caused I.R.S. "Intelligence" to contact Agent Kelly and mutually "go to work on Eisenberg"? Did anyone in this case outside of I.R.S. both to see what was in the clippings and determine why Petitioner was admittedly selected as a target for the I.R.S. The transcript proves the selection of Petitioner in black and white. Is the coverup by the powerful Milwaukee Journal of its own misconduct to be excused because of the power of the press? Their power should be limited when they act excessively or indecently just the same way that they condemn others.

There must be no such special privilege in the U.S.A. if this country is to remain free. The press, namely the Milwaukee Journal, not only

failed to tell the true facts but printed vicious repeated attacks on the Eisenbergs, selected for destruction. What a miscarriage of justice.

The I.R.S. Intelligence witness at the trial herein admitted Petitioner was one of three people selected by the I.R.S. Intelligence for prosecution. The details of the file were missing, so we can't repeat all the names. But the I.R.S. Intelligence witness in the trial admitted Petitioner was selected. The newspaper clippings were also in the file. What other proof is needed? When the I.R.S. Intelligence Agent contacted I.R.S. Agent Kelly to work with him on the case without telling Petitioner or "having him get wise" this is selectivity. This is persecution; there is no way Petitioner could have had a fair trial. The "bad" publicity, the "mumbo-jumbo" of the huge accumulation of the many thousands of records were twisted from nothing into sheer "horror" for the Petitioner. Is there no way to stop this terrible I.R.S. misuse of Petitioner?

Respectfully submitted,

SYDNEY M. EISENBERG,
Petitioner

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